IN THE

Supreme Court of the United States

October Term, 1978

No. 78-5066

IRVING JEROME DUNAWAY,
Petitioner

v.

STATE OF NEW YORK,
Respondent.

On Writ Of Certiorari To The Court Of Appeals Of The State Of New York

Brief For Petitioner

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OPINIONS BELOW

Defendant's judgment of conviction was entered on April 12, 1972. That judgment of conviction was affirmed by the Appellate Division, Fourth Department (42 A.D.2d 689 (1973)), and the Court of Appeals (35 N.Y.2d 741 (1974)). This Honorable Court granted the defendant's petition for certiorari, vacated the judgment and remanded the case to the New York State Court of Appeals for further consideration in light of *Brown* v. *Illinois*, 442 U.S. 590 (1975) (*Dunaway* v. *New York*, 422 U.S. 1053 (1975)).

After reargument, the New York State Court of Appeals affirmed the judgment of conviction, yet re-

manded the case to the Monroe County Court for a factual hearing and for such other proceedings as were necessary to decide the issues presented (38 N.Y.2d 812 (1975)). After the hearing in Monroe County Court, a decision was rendered by the Honorable Donald J. Mark, Monroe County Court Judge, which is not reported (A-116 thru A-122). The Appellate Division, Fourth Department reversed Judge Mark's decision and order (61 A.D.2d 299 (1978)) and the New York State Court of Appeals dismissd defendant's application for permission to appeal (A-134).

JURISDICTION

The petitioner's conviction was affirmed by the Court of Appeals of New York State, except for the suppression issue, on December 29, 1975. The judgment of conviction became final in all respects when the Court of Appeals dismissed petitioner's application for leave to appeal to the Court of Appeals from the order of the Appellate Division, Fourth Department, reversing the Monroe County Court's suppression order. The petitioner's application for leave to appeal to the Court of Appeals was dismissed on May 10, 1978. Petitioner's motion for reargument on the judgment of conviction was denied on June 13, 1978. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Was Petitioner arrested without probable cause and, if so, did the prosecution sustain its burden of

showing that the taint of the initial illegality was dissipated in view of the factors enunciated by this Court in *Brown* v. *Illinois,* 422 U.S. 590 (1975) so as to allow the trial court to receive Petitioner's confession and sketches into evidence.

2. If Petitioner was not arrested, then was the admission into evidence of Petitioner's confessions and sketches, given shortly after being taken to the police station, in violation of his rights under the Fourth Amendment, made applicable to the States by the Fourteenth Amendment, upon the ground that the confessions and sketches were the product of an unlawful seizure and detention of Petitioner for purposes of interrogation.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment IV: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces,

or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

The petitioner, Irving Jerome Dunaway, was charged by indictment, along with his co-defendant, Thomas James Mosley, with the crimes of Felony Murder and Attempt to Commit the Crime of Robbery in the First Degree. The charges arise out of an incident where, during the course of an attempted robbery of a pizza parlor by two males, one of the men (not the Petitioner) shot and killed the proprietor. The Petitioner and his co-defendant Mosley were tried

jointly. A jury found the Petitioner guilty on both counts. On April 13, 1972 he was sentenced by the Honorable George D. Ogden, Monroe County Court Judge, to an indeterminate sentence of imprisonment having a maximum term of life and a minimum of twenty-five years for Felony Murder and an indeterminate term having a maximum of fifteen years for attempted Robbery, both sentences to run concurrently.

Prior to trial, a motion was made to suppress statements and sketches obtained by police as a result of the Petitioner's illegal detention. A hearing was held and the trial court determined that both the statements and sketches were admissible. That judgment of conviction presently stands affirmed.

On August 3 and 4, 1976 a second suppression hearing was held by the Monroe County Court at the direction of the New York State Court of Appeals (38 N.Y.2d 812). Three police officers, Anthony L. Fantigrossi, Gerard Luciano, and Robert C. Mickelson, testified as witnesses for the prosecution. The facts developed at the hearing were as follows:

In August, 1971 Anthony L. Fantigrossi, who at that time was Detective Lieutenant on the Rochester Police Department, and in charge of the Physical Crimes Squad, was involved in the investigation of a homicide. The homicide had occurred during the course of an attempted robbery on March 26, 1971 at the Tower of Pizza, located on Genesee Street, Roch-

ester, New York. At 8:30 P.M. on August 10, 1971, Detective Fantigrossi received a call at his home from Detective Robert C. Mickelson (A-51). Mickelson told Fantigrossi that an informant, one O.C. Sparrow, had received information that one James Cole was a participant in the Tower of Pizza homicide. Fantigrossi went to the Public Safety Building and interrogated Sparrow (A-51). He had never met Sparrow before (A-55). It appears that Cole had told Sparrow that he (Cole) committed the crime along with someone named Irving. Cole was in custody at that time on an unrelated charge so Fantigrossi and Mickelson went to the Monroe County Jail and questioned him (A-52). After two hours of questioning, Cole told the detectives that he had no part in the crime (A-52). Cole told the detectives that one Hubert Adams, an individual with whom he had been incarcerated at the Monroe County Jail, had stated to Cole that Hubert Adams' brother, also known as "BaBa" Adams, had committed the crime (A-52-53; 56). In addition, Hubert Adams had told Cole that an individual named Irving was also involved in the crime. It is significant to note that the conversation between Adams and Cole took place approximately two months before Cole was questioned by Fantigrossi and Mickelson (A-52, 56). On August 10, 1971, the day Cole was questioned by the detectives, Hubert Adams was incarcerated at the Elmira Correctional Facility (A-56). There is nothing in the record to indicate how Hubert Adams obtained the information or that Cole knew how the information came into Adams' possession. Further, there is

nothing in this record which indicates that either Sparrow or Cole had ever provided reliable information to the police in the past.

Fantigrossi then issued the order to pick the petitioner up and bring him in (A-54; 92). The order was given to two teams of detectives, one composed of Mickelson and Ruvio (A-53). Fantigrossi wanted the petitioner brought in so that the police could interrogate him regarding the homicide (A-57-58). Mickelson and Ruvio were already involved in the investigation of the case and "knew as much about the case as (Fantigrossi) did." (A-58). Fantigrossi admitted that, when he gave the order, he *knew* he did not have enough information to obtain an arrest warrant (emphasis supplied) (A-60).

The following morning at approximately 8:00 A.M., Detective Gerard Luciano drove Detectives Mickelson and Ruvio to the petitioner's home on Broad Street (A-69). Mickelson and Ruvio had been to the Dunaway residence several times throughout the preceding night, looking for the petitioner (A-91). The remainder of the night they spent searching the west side of Rochester (A-92-93).

After arriving at the Dunaway residence, Mickelson and Ruvio were met by the petitioner's mother at the door. Both the detectives entered the home and searched throughout the house for the petitioner (A-93-94). Mrs. Dunaway was told that the police were conducting an investigation and they were looking for her son.

Meanwhile, Detective Luciano remained outside in the driveway in a position where he could observe anyone attempting to escape out the side door or window (A-27-73). Before Mickelson came out of the house, Luciano observed a young girl exit from the side door, walk down Broad Street, turn the corner onto Walnut Street and enter the third house from the corner (A-73). Mickelson then came out of the Dunaway home and he and Luciano walked to the house on Walnut Street. Mickelson went to the door while Luciano once again positioned himself in the driveway (A-75). The petitioner came to the door and Mickelson said "Axlerod Dunaway." (A-69). The petitioner was then taken by the two detectives to the unmarked police car and transported to the Public Safety Building where he was turned over to Officer Novitskey for interrogation.

It should be kept in mind that the detectives were in plain clothes and drove an unmarked vehicle. Detective Mickelson was approximately 6'3" tall and weighed 203 pounds. Luciano was taller than Mickelson (A-109). Irving Dunaway was 18 years old, weighed approximately 130 pounds and was about 5'7" tall. He had gone as far as the tenth grade in school.

Mickelson denied ever having physical contact with the petitioner but neither he nor Luciano could remember whether Luciano physcially grabbed the petitioner at any time (A-67; 98; 99; 102). Ruvio and Luciano rode in the front seat and Mickelson was

seated in the back seat with the petitioner on their way to the Public Safety Building. In spite of the fact that the petitioner questioned the detectives as to the reason for his being taken downtown, none of the detectives told him that he was a suspect and at no time prior to his arrival at the Public Safety Building was he advised of his rights (A-6-7; 81-82). He was merely told that they would talk about it when they arrived at their destination. It is important to note that at no time did the police ever inform the defendant of his right not to go downtown with them.

At the time of his arrest and detention on August 11, 1971, this defendant was only eighteen years old (A-31). The defendant testified that at approximately eight o'clock in the morning on August 11, 1971, his sister came to a friend's house where he was staying to inform him that the police were at their house looking for him (A-32). As Mr. Dunaway began to leave his friend's house, a detective came up to the steps of the house and as he was walking down the steps that detective grabbed him by the arm and called for another detective who was nearby (A-32). The second detective grabbed him by the belt of the pants and they began walking toward Broad Street (A-32). The detectives then put the youth in the police car and they drove downtown (A-32-33). Irving testified that he asked the police why they were taking him downtown and the police detectives did not respond (A-33). The defendant also testified that he was not advised of his rights until just before the steno-

graphic statement was taken, which was about one hour after the interrogation began (A-35). It is significant to note that this was the first time in his life that the defendant was ever questioned by the police or placed in an interrogation room (A-37).

Shortly after their arrival at the Public Safety Building, the defendant made an incriminating statement (A-8-8; 10-11) and drew two incriminating sketches (A-12-13).

Detective Novitskey also testified that he advised the defendant of his *Miranda* rights prior to any questioning (A-6-7); however, the defendant's signature did not appear on the waiver of rights card (A-15). It should be noted that at no time was the defendant ever advised by Detective Novitskey that the sketches he made could be used against him in a court of law (T.M.297[1]).

At the close of the People's proof, the District Attorney stipulated that the defendant was in the physical custody of the detectives from the time he left the Walnut Street address with the two detectives until they arrived at headquarters and if he had attempted to leave he would have been physically restrained and handcuffed (A-109-110).

[1] T.M. refers to the page in the Trial Minutes at which the factual information indicated can be found since those minutes are not part of the appendix filed with this court.

SUMMARY OF ARGUMENT

The petitioner was arrested by the Rochester Police Department on August 11, 1971 and taken to the police headquarters for purposes of investigation and/or interrogation. Clearly, the arrest was not based on probable cause, and the lower courts have so held. Shortly after his arrest, petitioner made a confession and sketches which were admitted into evidence against him at trial. Later that same day petitioner made a second oral statement which was stenographically recorded the next day. However, that second statement was not admitted into evidence at his trial. Both the confessions and the sketches were obtained as the result of petitioner's illegal arrest and the respondent failed to sustain their burden of establishing that the taint of that illegal arrest had been dissipated by intervening factors. Therefore, the confessions and sketches should have been excluded from evidence under this Court's holdings in *Brown* v. *Illinois,* 422 U.S. 590 (1975) and *Wong Sun* v. *United States,* 371 U.S. 471 (1963). Secondly, if this Court should choose to apply the "reasonableness standard" developed in *Terry* v. *Ohio,* 392 U.S. 1 (1968), the confessions and sketches were still inadmissible since the police conduct of "seizing," "detaining" *and* "interrogating" petitioner was *not* reasonable in view of the factors involved in this case, as well as, the information possessed by the police.

POINT I: The Petitioner Was Arrested Without Probable Cause And, Since The Taint Of That Illegal Arrest Was Not Proven By The Prosecution To Have Been Dissipated, The Confession Obtained By The Police Shortly After Petitioner's Arrest Was Erroneously Admitted Into Evidence At His Trial Since It Was Obtained In Violation Of Petitioner's Constitutional Rights Under The Fourth And Fourteenth Amendments.

This case was originally remanded to the New York State Court of Appeals for Reconsideration in light of *Brown* v. *Illinois*, 422 U.S. 590 (1975). See, *Dunaway* v. *New York*, 422 U.S. 1053 (1975). It is, therefore, appropriate to analyze the issue presented in terms of (a) the petitioner's arrest by the Rochester Police Department; (b) if there was an arrest, did the police have probable cause for the arrest and subsequent detention; and, (c) if there was an arrest without probable cause, then was the taint of that illegal arrest purged by any of the factors enunciated by this Court in *Brown* v. *Illinois*, supra at 604,-605.

A: The Petitioner's Detention

Irving Dunaway was taken into physical custody by detectives from the Rochester Police Department shortly after 8:00 A.M. on August 11, 1971 (A-89; 91). The police detectives were instructed by their superior to "pick him up and bring him in" (A-54). They receive this same instruction when they have a warrant of arrest for a particular person (A-108).

As Detective Fantigrossi clarified on cross-examination (A-61):

> Q. You told them to arrest him?
>
> A. If you are talking about taking away the freedom of movement, if that is the word, yes, then it is arrest.

The arresting officers went to the petitioner's home looking for him and it is clearly established on this record that they were going to bring him downtown even if they had to use physical force to do so (A-109). The petitioner was taken from a private dwelling to police headquarters. Detective Mickelson went so far as to admit that this petitioner was "informally" under arrest (A-106). However, excessive physical force was not required to be used since the petitioner succumbed to the police authority (A-33), according to petitioner, after being grabbed by the belt (A-32). After all, the record indicated that Detective Mickelson is six feet three inches tall and weighed two hundred and five pounds and Detective Luciano was even larger than Mickelson (A-109). Obviously, this defendant, who stands five feet seven inches tall and weighed 130 pounds, was not in any position to resist the officers' intention of taking him downtown.

Petitioner was placed in a police car (A-33) with two detectives seated in the front seat and a third detective seated in the back with petitioner (A-33).

It is significant to note that the police never advised Dunaway that he had the right not to go with

them, if he so desired (A-81). It is even more significant that the police refused to tell the petitioner why he was being taken downtown despite his repeated inquiries (A-81; 100). There can be no question that the illegal detention here was for the purpose of questioning the petitioner "incommunicado" in hope of turning up evidence (A-54; 56-57; 99).

In view of these facts it is not suprising that the hearing court found that "this case does not involve a situation where the defendant voluntarily appeared at police headquarters in response to a request of the police (citation omitted), or where the defendant was merely escorted to police headquarters by the police (citation omitted)" (A-117). In fact, the Court went on to hold that "the factual predicate in this case did not amount to probable cause sufficient to support *the arrest* of the defendant" (A-121, emphasis supplied). The Appellate Division did not reject this finding. Rather, the court ruled that despite the lack of probable cause, the police were permitted *to detain* the petitioner because their information amounted to "reasonable suspicion" (A-125-126).

The lower court's determination that petitioner was arrested is justified by the record and should not be disturbed by this Court. *Watts* v. *Indiana*, 338 U.S. 49, 51-52 (1949); *Beck* v. *Ohio*, 379 U.S. 89, 100, [Harlan, J., dissenting] (1964).

"To constitute an arrest, there must be an actual or constructive seizure or detention of the person,

performed with the intention to effect an arrest and so understood by the person detained." *Hicks* v. *United States*, 382 F2d 158, 161 (D.C. Cir. 1967) quoting, *Jenkins* v. *United States*, 161 F2d 99, 101 (10th Cir. 1947); accord, *United States* v. *Jones*, 352 F.Supp. 369, 377 (S.D. Georgia 1972) affd., 481 F2d 1402 (5th Cir. 1973); *Fisher* v. *United States*, 324 F2d 775 (8th Cir. 1963), cert, denied, 337 U.S. 999 (1964).

As the court in *United States* v. *Jones*, *supra*, at 378 appropriately noted:

> It [arrest] is not when the officer formally proclaims a person to be in custody but when one is effectively restrained and is cognizant thereof that matters. *United States* v. *Washington*, D.C., 249 F. Supp. 40, affirmed 130 U.S. App. D.C. 374, 401 F2d 915. See also *United States* v. *Davis*, D.C., 328 F. Supp. 350, 352 and *United States* v. *Birdsong*, 446 F2d 325, 328 (5th Cir.). . . .If there is significant interference with a defendant's liberty, the fact that the police did not intend to make a formal arrest or did not think that their actions constituted an arrest is irrelevant to compliance with Fourth Amendment standards. *United States* v. *Stafford*, D.C., 303 F. Supp. 785, 788.

It has also been said that,

> To effect an arrest there must be actual or constructive seizure or detention of the person arrested, *or his voluntary submission to custody* and the restraint must be under real or pretended legal authority. . . .If the person arrested under-

> stands that he is in the power of the one arresting and submits in consequence, it is not necessary that there be an application of actual force, a manual touching of the body, or a physical restraint that may be visible to the eye. *United States* v. *Lampkin*, 464 F2d 1093, 1095 (3rd Cir. 1972) quoting 5 Am. Jur. 2d 695-696, emphasis added; Accord, *Commonwealth* v. *Farley*, 364 A.2d 299 (Sup.Ct. Pa 1976).

As the Pennsylvania Supreme Court stated, "...an arrest may be effectuated without the actual use of force and without a formal statement to the detainee that he is being arrested (citations omitted). Moreover, an arrest cannot be disguished by the use of such terms a 'investigatory detention'. *Davis* v. *Mississippi*, 394 U.S. 721 (1969); *Commonwealth* v. *Fogan*, 296 A.2d 775, 758 (1972)." *Commonwealth* v. *Farley, supra*, at 302.

The record in this case clearly establishes the fact, as determined by the lower court, that this petitioner was arrested. The police were under orders to "pick him up and bring him in" and this was the same order they were given to arrest someone based on a warrant (A-54; 108). Yet, in this case they went to petitioner's house without a warrant (A-108). The police clearly indicated that the defendant was not free to go either at the inception of this confrontation or upon their arrival downtown at police headquarters (A-73; 96). This fact is further supported by the stipulation of the prosecutor that the defendant was in the detectives physical custody and had he attempted to leave,

he would have been physically restrained (A-109, 110). The petitioner submitted to police authority and did not attempt to resist their arrest (A-32-33). Clearly, he knew he was in their control and custody as evidenced by his inquiries of why he "had to go" downtown.

As Detective Luciano testified (A-81):

> A: He [the Petitioner] said well, I think if I remember, he said why do we have to go downtown and talk. We [the detectives] said we would discuss that in full when we got downtown.
>
> Q. Your testimony is he asked why he had to go downtown and talk?
>
> A. Yes, sir.

The arrest in this case closely parallels that of the petitioner in *Davis* v. *Mississippi*, 394 U.S. 721 (1969). In both cases the petitioners were taken to police headquarters and there was more than a "significant interference with the defendants' liberty." Petitioner's case is more serious than Davis' in that Davis was detained merely for fingerprinting which "involve[d] none of the probing into an individual's private life and thoughts which marks an interrogation...." See, *Davis* v. *Mississippi, supra*, at 727.

Clearly, the confrontation between the petitioner and the Rochester Police Department constituted, as

found by the hearing court, an arrest. *Davis* v. *Mississippi, supra; Brown* v. *Illinois, supra; United States* v. *Lampkin, supra; Commonwealth* v. *Farley, supra; United States* v. *Jones, supra.*

B: Was There Probable Cause For Petitioner's Arrest?

This Court has consistently held and it has become axiomatic in our system of jurisprudence that under the Fourth Amendment "The standard for arrest is probable cause." *Gerstein* v. *Pugh,* 420 U.S. 103, 111 (1974). See also, *Beck* v. *Ohio, supra; Henry* v. *United States,* 361 U.S. 98 (1959); *Brown* v. *Illinois, supra; Brinegar* v. *United States,* 338 U.S. 160, 175-176 (1949); *Terry* v. *Ohio,* 392 U.S. 1, 20-22 (1968). The protections provided by the Fourth Amendment have been held to be applicable to the States through the Fourteenth Amendment. *Mapp* v. *Ohio,* 367 U.S. 643 (1961).

What information did the Rochester Police have to arrest the petitioner on August 11, 1971, for investigatory purposes in connection with the Tower of Pizza murder which occurred on March 26, 1971?

The police had received information from an informer (O.C. Sparrow) that James Cole and a guy by the name of Irving were involved in the murder (A-51). Not only was Sparrow's reliability never established, but the detectives had never met him before (A-55). Apparently, the basis for Sparrow's information was

a conversation he had with Cole. The police then proceeded to question Cole, who was in custody at that time. Cole denied any involvement in the crime and after two hours of questioning (A-52) told the police that he heard from Hubert Adams that Hubert's brother, "BaBa," and another guy named Irving were involved in the crime. At no time did the police or the prosecutor ever attempt to establish the reliability of this second, "disclaiming" informer. The information Cole related to the police was at least two months old. Based on this multiple hearsay information from an unreliable informer, Detective Fantigrossi ordered Mickelson and others "to pick up" the petitioner and "bring him in" (A-54).

It appears obvious to this writer that the information the police had did not amount to "probable cause." In fact, both the hearing court and the Appellate Division held that "this hearsay information did not constitute probable cause to arrest defendant" (See, *People* v. *Dunaway,* 61 A.D.2d 299, 302).

The information the police had in this case was far less than the authorities had *Aguilar* v. *Texas,* 378 U.S. 108 (1964), *Spinelli* v. *United States,* 393 U.S. 410 (1969) and *Wong Sun* v. *United States,* 371 U.S. 471 (1963). The information provided by the first informer (Sparrow) was later proven to be unreliable when the second informer (Cole) denied any involvement in the murder. Further, the police admitted they had never even met Sparrow prior to obtaining the information from him.

The information Cole provided to the police was an attempt to shift the focus of the police investigation from himself to another person. It is important to note that Cole's information was obtained more than two months prior to the questioning by Fantigrossi, which took place more than four and one-half months after the murder. It, therefore, was correctly found by the hearing court to have been "stale." See, *Sgro* v. *United States*, 287 U.S. 206 (1932).

Since the hearing court (A-121; 125-126) and the Appellate Division have found that the police lacked information that would rise to the level of probable cause, petitioner respectfully submits that the police clearly lacked facts which would support a finding of probable cause sufficient to justify the arrest of petitioner and that finding is amply justified by the facts established in the record.

C: Was The Taint Of The Illegal Arrest Purged By Any Of The Intervening Factors Enunciated By This Court In Brown v. Illinois, 442 U.S. 590 (1975)

As previously indicated, this Court remanded petitioner's case to the New York Court of Appeals for "further consideration in light of *Brown* v. *Illinois*," *supra*. In *Brown*, this Court examined and explained its earlier holding in *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

This Court stated, "The question of whether a confession is the product of a free will . . . must be

answered on the facts of each case." *Brown* v. *Illinois*, *supra*, at 603.

It is important to note that "the voluntariness of the statement is a threshold requirement" *Brown* v. *Illinois*, *supra*, at 604. Petitioner respectfully submits that the Miranda warnings are an important factor in that respect. Clearly, if the statement obtained was not voluntary then it would not be admissible in view of the protections provided by the Fifth Amendment (*Miranda* v. *Arizona*, 384 U.S. 436 (1966)) and this Court would not have been compelled to reach the Fourth Amendment question posed in *Brown*.

In determining whether a confession is the "fruit" of an illegal arrest and, therefore, should be excluded, this Court clearly declined to adopt either a "per se" or "but for" rule. Rather, this Court held that the following factors were relevant in determining whether a confession is the product of a free will: "[1] The proximity of the arrest and confession (footnote and citations thereunder omitted), [2] the presence of intervening circumstances (citation omitted), and, particularly, [3] the purpose and flagrancy of the official misconduct (footnote and citations thereunder omitted)."

It is interesting to note that the Appellate Division found (by a 3 to 2 vote) sufficient factors which attenuated the primary taint while the hearing court found that "there was no claim or showing by the [Respondent] of any attenuation of the defendant's illegal detention" (A-121).

detention were in fact still available to Detective Fantigrossi when he decided to have Dunaway "grabbed" for interrogation.

Second, in attempting to distinguish Brown, the New York Court of Appeals characterized the seizure in Brown as an arrest "without a scintilla of evidence casting suspicion upon [the defendant]." People v. Morales, supra at 136-37. However, in this Court's only comment on the adequacy of the evidence underlying the seizure challenged in Brown, concurring Justices Powell and Rehnquist assessed the evidence accumulated by the arresting officers as sufficient to require a remand to determine whether the officers reasonably believed they had probable cause. 422 U.S. at 613. In other words, the only members of this Court to address the question clearly thought that the seizure in Brown was based on at least some articulable suspicion. 2/ Thus, the New

2/ In Brown, Justices Powell and Rehnquist argued that supression was inappropriate if the arresting officers acted in good faith; therefore, they analyzed the evidence and determined that good faith was a question of fact for remand. The majority, adhering to the traditional view that illegally

(FN 2 continued on next page)

York courts have misread Brown, and have relied upon a distinction between Brown and this case which does not exist.

Third, as this Court held recently in Mincey v. Arizona, supra, the nature or gravity of the offense being investigated is simply irrelevant to determining the scope of Fourth Amendment protections. 57 L.Ed.2d at 300. See also Michigan v. Tyler, supra; Coolidge v. New Hampshire, supra.

Finally, characterizing this detention as "brief" is inaccurate and misleading. As in Brown, the detention here was not "brief" within the meaning of Terry v. Ohio, supra. Petitioner was not stopped for a few minutes on a street corner and then allowed to proceed. Instead, he was forcibly taken to a police station, and deprived of his liberty of movement for hours. The existence or non-existence of formal "arrest" records is an irrelevant question of state law, and New York cannot

obtained evidence must be suppressed regardless of the arresting officer's subjective good faith, did not have to reach this question once it decided that the seizure of Brown was effected on less than probable cause.

legalize an unconstitutional seizure by not recording it.

No matter how New York characterizes this detention, it in fact epitomizes precisely the type of "seizure" of the person that the Fourth Amendment's probable cause requirement was designed to regulate. This Court's prior rulings make clear that for constitutional purposes a "seizure"--whether an "arrest" or "investigatory detention" under state law--occurs whenever police take a suspect into custody, whether they charge him with a crime or not. See Terry v. Ohio, supra, at 16, 19; Sibron v. New York, 392 U.S. 40, 66-67 (1968); Davis v. Mississippi, supra, at 726-27 (1969); Draper v. United States, 358 U.S. 307, 311 (1959). See also cases cited at fn. 4, infra. In Davis, for example, a custodial detention was labelled "investigatory" by the police to avoid the probable cause requirement. But this Court rejected that characterization and equated the detention with a full-fledged arrest. In Brown, the Court treated an investigatory detention, which included removal to a police station, as a full scale arrest. In both cases, nominally "investigatory"

detention was held unconstitutional absent probable cause. As in all Fourth Amendment cases, the relevant inquiry here is into the degree of intrusion into personal liberty that the challenged practice involved and into the adequacy of the factual basis put forward to justify it. The inquiry does not end just because the practice has been given an inoffensive name, or because state law enforcement interests weigh heavily in the balance. See Argument I.C, below.

In addition, it would be anomalous to hold under the Fourth Amendment that a custodial detention for questioning does not rise to the level of "seizure" requiring probable cause when it is sufficiently "custodial" to invoke the full protections of the Fifth and Sixth Amendments. See Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964); Miranda v. Arizona, 384 U.S. 436, 444, 477-78 (1966). Compare Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (Miranda warnings necessary when suspect "is no longer free to go where he pleases"). Although under certain circumstances Fifth and Sixth Amendment rights might be triggered in the absence of Fourth Amendment rights, it is hard to imagine a

situation where an investigation is focused to a point that warrants custodial interrogation at a police station after Miranda warnings that does not also warrant full Fourth Amendment protections. Dunaway's full Fourth, Fifth, and Sixth Amendment rights should have been triggered at the same time.

B. The Fourth Amendment Permits "Stops" For Questioning Based On Less Than Probable Cause, But Prohibits More Intrusive Detentions Without Probable Cause.

Central to the decision of the New York court in this case was the view that custodial detention at a police station for questioning is somehow different from an "arrest," and therefore justifiable on the lesser standard of "reasonable suspicion." However, this Court's decisions regarding forcible police detentions for investigative purposes make clear that such an analysis is wrong. A forcible custodial detention for investigative purposes which includes transportation to a police station for questioning is illegal absent probable cause and a warrant.

In the ordinary police investigation of an unsolved crime, interviewing witnesses and potential suspects is, of course, an effective, and often indispensable police procedure. See the extensive discussion in Culombe v. Connecticut, 367 U.S. 568 (1961). The Court has stated several times that an officer is not required to avoid street encounters made for the purpose of investigating suspicious persons or seeking out witnesses. In Terry the Court said that it would be "poor police work indeed" to avoid such contact in suspicious circumstances. 392 U.S. at 23. See also Adams v. Williams, 407 U.S. 143, 145-46 (1971) Terry v. Ohio, supra, at 13-16, 19 fn. 16, 22, 30, 34 (1968); Sibron v. New York, supra, at 63; Miranda v. Arizona, supra, at 477-78; Palmer v. Euclid, 402 U.S. 544, 546 (1971).

However, although the Court held in Terry, supra, at 19, fn. 16, that ". . . not all personal intercourse between policemen and citizens involves 'seizures of persons,'" it also held that when police "intercourse" for the purpose of investigation or otherwise does become a "seizure" it is governed by the Fourth Amendment.

The Court expressly refrained in Terry, as it did subsequently in Morales v. New York, supra, at 105, and Davis v. Mississippi, supra, at 728, from deciding, ". . .the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation," Terry v. Ohio, supra, at 19, fn. 16. But under any reasonable reading of the Fourth Amendment case law, petitioner's detention constituted what has always been recognized as a full-fledged arrest. Examining the three instances in which this Court has permitted the seizure of a person on less than probable cause only confirms this conclusion.

Terry was the Court's first departure from the rule that probable cause must justify all police seizures. The Court stressed the narrowness of the exception by reaffirming prior Fourth Amendment rulings. It emphasized that "specific reasonable inferences" are required for stops, Id. at 27. And it limited the permissible scope of the "frisk. . .to that which is necessary for the discovery of weapons which might be used to harm the officer. . . ." Id. at 26. See also

Sibron v. New York, supra, and Adams v. Williams, supra.

The second departure from the rule commanding that probable cause justify all police "seizures" arose in the context of brief interrogation stops of suspicious automobiles near United States borders. United States v. Brignoni-Ponce, 422 U.S. 873 (1975). The Court ruled that a "reasonable suspicion" not amounting to probable cause was required to justify a stop for brief questioning. United States v. Brignoni-Ponce, supra, at 880-82.

The third and final exception to the probable cause requirement for seizures of the person concerns a traffic officer's request that a driver exit his vehicle upon being stopped for a minor traffic violation. Pennsylvania v. Mimms, ___ U.S. ___, 54 L.Ed.2d 331 (1977). Again, the Court emphasized the safety of the officer, as compared to the de minimis added intrusion of the requirement to exit the vehicle once the driver has been legitimately stopped. Requiring a driver to exit a car was characterized by the Court as only "a petty indignity." Id. at ___, 54 L.Ed.2d at 337, quoting Terry v. Ohio, supra, at 17.

The Court did not justify these exceptions to the probable cause requirement merely by saying that they were all short or that they were all minimally intrusive. And the fact that Dunaway was taken by force to the police station is not the only difference between his seizure and the momentary stops the Court has authorized. The stops the Court has permitted all had another feature in common which Dunaway's seizure does not share. All of them involved the Court's attempt to fashion flexible and realistic responses for police officers to use in coping with rapidly evolving situations beyond their control. None of them involved a chief detective sitting at his desk and leisurely deciding which suspects to haul in. The Court has authorized departures from the strict requirement of probable cause to foster good police work, not bad. Justice White's concurring opinion in Terry v. Ohio, supra, illustrates the point by highlighting the limits on the responses available to the officer for dealing with unanticipated on-the-street confrontations:

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation. Id. at 24-25 (White, J., concurring).

Planned police activities, or more intrusive police actions, would each be proscribed under Terry. Dunaway's detention was both planned and more intrusive.

Taken together, the Court's exceptions to the probable cause requirement define the constitutional rule: anything more than a brief on-the-spot restraint is plainly an "arrest" for constitutional purposes, and it requires probable cause, whether the detaining officer intends to prefer formal charges or merely to

"investigate". Considered together, the exceptions only confirm that Dunaway's case is within the traditional constitutional rule.

C. The New York Standard For Investigatory Detention Is Based On Irrelevant Factors And Will Confuse Fourth Amendment Jurisprudence.

New York seeks to circumvent the clear command of the Fourth Amendment probable cause requirement by labelling the forcible custodial detention of petitioner as something other than an arrest. As in Mincey v. Arizona, supra, and Coolidge v. New Hampshire, supra, New York claims that its interests in efficient law enforcement outweigh the values of personal privacy and security that the Fourth Amendment was designed to safeguard. But the framers of the Fourth Amendment have already struck a balance between state and personal interests. Brinegar v. United States, 338 U.S. 160, 176 (1949). The probable cause requirement, as interpreted and applied by judges for over two hundred years in thousands of different factual situations, provides

a reliable standard for determining the intensity of factual inferences of guilt necessary to justify the seizure of a person.[3/] There is no reason to abandon it now.

A "seizure" within the meaning of the Fourth Amendment is the deprivation of liberty which precedes the initiation of formal criminal proceedings. Formal "arrest" and the creation of permanent police records are less onerous, added intrusions, which are defined by varying provisions of state law. But the initial seizure itself is the most intrusive act in the apprehension process.

That the Fourth Amendment does not prohibit all seizures is beyond dispute; it prohibits only "unreasonable" seizures. But also beyond dispute is the rule that police functions must be accomodated to the primary and overriding interest of the Fourth Amendment--to protect the citizenry from improper "searches and seizures" :

3/ See cases cited in footnote 4, infra.

"[T]o argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment. Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.' " Davis v. Mississippi, supra at 726-727 (footnote omitted)4/

4/ Some of the major cases which define and support the proposition that the Fourth Amendment requires probable cause to protect citizens from wrongful seizure are as follows: Gerstein v. Pugh, 420 U.S. 103, 112 (1975); Cupp v. Murphy, 412 U.S. 291, 294 (1973); United States v. Dionisio, 410 U.S. 1, 10-11 (1973); Papachristou v. Jacksonville, 405 U.S. 156, 169 (1972); Davis v. Mississippi, 394, U.S. 721, 726-727 (1969); Terry v. Ohio 392 U.S. 1 (1968); Sibron v. New York, 392 U.S. 40 (1968); McCray v. Illinois, 386 U.S. 300 (1967); Beck v. Ohio, 379 U.S. 89, 91 (1964); Ker v. California, 374 U.S. 23 (1963); Wong Sun v. United States, 371 U.S. 471 (1963); Rios v. United States, 364 U.S. 263 (1960); (footnote continued on next page)

None of the justifications set forth by New York for a relaxed investigative detention rule relates to the fundamental need to protect the innocent from seizure. None of these justifications lessens the severity of this highly intrusive seizure. Instead, most of New York's justifications are merely self-serving

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Henry v. United States, 361 U.S. 98, 100-104 (1959); Draper v. United States, 358 U.S. 307 (1959); Giordenello v. United States, 357 U.S. 480, 486 (1958); Brinegar v. United States, 338 U.S. 160, 175-176 (1949); Trupiano v. United States, 334 U.S. 699, 709-710 (1948); Johnson v. United States, 333 U.S. 10, 13-15 (1948); United States v. Di Re, 332 U.S. 581, 593-595 (1948); Carroll v. United States, 267 U.S. 132, 156 (1925); Director General v. Kastenbaum, 263 U.S. 25, 28 (1923); Stacey v. Emery, 97 U.S. 642-645 (1878); Ex Parte Burford, 3 Cranch 448 (1806); see also the historical information including quotations from James Otis; the Virginia Declaration of Rights and the Maryland Declaration of Rights as well as citation to North Carolina Declaration of Rights--Act II, Pennsylvania Constitution--Act 10, Massachusetts Constitution--Pt. I, Art. 14, in Henry v. United States, supra at 100-101.

characterizations of what likely occurs during a vast majority of constitutionally proper arrests, and the rest are simple over-statements of the police interest in avidly pursuing an investigation when the probable cause standard would appropriately slow it in order to protect the innocent.

Moreover, the justifications relied on by New York to exempt investigatory detentions from the probable cause requirement too easily lend themselves to distortion and dilution. Petitioner's case is a good example. In Morales, the New York Court of Appeals gave assurances that investigatory detentions absent probable cause would be permitted only when "all other investigatory techniques ... had been exhausted," 42 N.Y. at 136. And that court twice relied on the asserted fact that Morales could have left the police station whenever he desired. 22 N.Y. 2d 55, at 62; 42 N.Y. 2d 129 at 133. But here the New York courts disregarded these requirements. The detectives had substantial leads to

two other persons which they could have pursued before taking petitioner into custody, and it is conceded that petitioner was not free to leave. The fact that the New York courts permitted Dunaway's detention under these circumstances illustrates the unmanageability of the Morales standard. It also demonstrates the virtues of the bright-line test afforded by present Fourth Amendment doctrine, which treats all forcible custodial detentions as "seizures" requiring probable cause.

Adoption by this Court of a sliding scale standard for Fourth Amendment issues, to be adjusted in the first instance by state courts, will "only produce more slide than scale." Amsterdam, "Perspectives on the Fourth Amendment," 58 Minn. L. Rev. 349, 394 (1974). This Court will be required to rewrite existing Fourth Amendment doctrine in exhaustive--and exhausting--detail.[5/] Thus, considerations of judicial

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5/ One of the more obvious, inescapable side-effects of ruling that a custodial interrogation may be based upon less than probable cause is the possibility that the immunity police officers now

(Footnote 5 continued on next page)

economy, as well as individual liberty, also support rejection of New York's approach. Defining "reasonable suspicion", "brief" detentions, "carefully controlled circumstances", and crimes which are "brutal and heinous"-- and balancing all these considerations against intrusions on individual liberty in particular cases--would be a major new undertaking for the Court. Adopting New York's approach would require that it be done.

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enjoy from civil suits for false imprisonment and malicious prosecution would have to be expanded. Cases which refer to this immunity under present probable cause doctrine include, Stacey v. Emery, 97 U.S. 643, 644 (1878); Director General v. Kastenbaum, 263 U.S. 26 (1923); Henry v. United States, 361 U.S. 98, 102 (1959); Carroll v. United States, 267 U.S. 132, 155 (1925); Terry v. Ohio, 392 U.S. 1, 22 (1968); Pierson v. Ray, 386 U.S. 547, 555 (1967); Wood v. Strickland, 420 U.S. 308, 317 (1975).

II. INCULPATORY EVIDENCE OBTAINED AS THE RESULT OF THE UNCONSTITUTIONAL SEIZURE IN THIS CASE IS TAINTED AND MUST BE SUPPRESSED.

Three of the five justices of the Appellate Division ruled that even if the seizure of Dunaway had been improper, his statements and sketches would have been admissible because they were not tainted by the seizure. (A-9). People v. Dunaway, supra, at 303. This ruling is erroneous under the holdings of this Court in Wong Sun v. United States, 371 U.S. 471 (1963); Brown v. Illinois, supra, at 603-604; and Davis v. Mississippi, supra.

Here, as in Brown, there were no intervening circumstances, aside from Miranda warnings, which could have dissipated the effect of the illegal detention. Here, as in Brown, the seizure itself was coercive and was undertaken for the specific purpose of eliciting inculpatory statements. As the trial court succinctly stated on remand:

> Since the Miranda warnings by themselves did not purge the taint of the defendant's illegal seizure, Brown v. Illinois,

> supra, and there was no claim or showing by the people of any attenuation of the defendant's illegal detention, People v. Martinez, [37 N.Y. 2d 662], the defendant's statements and sketches are inadmissible. (A-24). (emphasis added).

Here, as in Brown, the defendant's statements must be suppressed.

Conclusion

The Judgment entered below should be reversed.

Respectfully submitted,

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